IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of : LYUBOV POPKOV, Respondent, v. ILYA POPKOV, Appellant.	No. 37561-3-II ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND ORDER AMENDING OPINION

The unpublished opinion in this case was filed on May 12, 2009. Upon the motion of the appellant for reconsideration, it is hereby

ORDERED that the appellant's motion for reconsideration is hereby denied. It is further

ORDERED that the opinion previously filed on May 12, 2009, is hereby amended as follows:

Page 6, line #19-21, the following text will be deleted:

> Lyubov submitted to the trial court other dissolution pleadings Ilya signed on the same date listed in the joinder, which allowed the court to infer that Ilya also signed the joinder that day.

Page 6, line #19, the following text shall be inserted:

> Lyubov submitted to the trial court another dissolution pleading Ilya signed on the same date listed in the joinder, which allowed the court to infer that Ilya also signed the joinder that day.

IT IS SO ORDERED.

Dated this _____ day of _____, 2009.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.

No. 37561-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of : LYUBOV POPKOV, Respondent, v. ILYA POPKOV, Appellant.	No. 37561-3-II UNPUBLISHED OPINION

Armstrong, J. — Ilya Popkov appeals the trial court's denial of his CR 60 motion to vacate his decree of legal separation and dissolution, alleging that the decree was based on a fraudulent joinder and that the trial court erred by not taking oral testimony on the joinder's validity. Because Ilya waived his right to give live testimony and because substantial evidence supports the trial court's determination that the joinder is valid, we affirm.

FACTS

Lyubov and Ilya Popkov married in Russia in 1987. On November 21, 2005, Lyubov[1] filed a summons and petition for legal separation. Along with the petition, Lyubov filed a joinder that reads:

> I have read the petition and join in it. I understand that by joining the petition, a decree or judgment and order may be entered in accordance with the relief requested in the petition, unless prior to the entry of the decree or judgment and order a response is filed and served. . . . I waive notice of entry of the decree.

[1] We refer to the parties by their first names for the sake of clarity.

Clerk's Papers (CP) at 185. Ilya's signature appears on the joinder, dated November 15, 2005. In the petition, Lyubov asked for the following property: a 1998 Suzuki Sidekick, the family home, all home furnishings, and a tractor. The petition requested the trial court to award Ilya a 1984 Chevy van, a 1987 Dodge Caravan, and his tools. It also requested that Lyubov be responsible for the Key Bank debt and credit cards in her name and that Ilya be responsible for his credit cards and debts incurred without her knowledge. Finally, Lyubov asked the court to order Ilya to pay her $300 per month in maintenance.

On December 2, 2005, a commissioner entered a decree of separation, a final parenting plan, an order of child support, and made findings of fact and conclusions of law based on "agreement." CP at 18, 35, 46, 55. The trial court awarded assets and debts according to the petition, after finding that the community property was limited to the family home in Lakebay, Washington, and one community debt to Key Bank for $65,000. Although Ilya had signed a proposed parenting plan on November 15, 2005, the same day he allegedly signed the joinder, he did not sign the petition for legal separation or any of the final separation orders. Nevertheless, the court found that Ilya "appeared, responded or joined in the petition." CP at 47.

Ilya asserts that he did not learn of the separation decree until August 28, 2007, when Lyubov filed and served a motion to convert the separation decree into a dissolution decree. But he states in another part of the record that he was aware of the separation decree two months after it was entered.

On September 5, 2007, Ilya's attorney filed a notice of appearance, and Ilya filed a declaration asserting that he did not receive sufficient notice of Lyubov's motion to convert the

decree of separation into dissolution and requesting a continuance. He asserted that he had just hired an attorney and that he believed that he and Lyubov "have property distribution issues which have never been resolved." CP at 66. He did not argue that the joinder was fraudulent or ask to give live testimony on its validity; and nothing in the record shows that he otherwise responded to Lyubov's motion to convert the legal separation decree into a dissolution decree.

On October 23, 2007, the trial court found that the marriage was irretrievably broken and dissolved the marriage by converting the decree of separation into a decree of dissolution.

On January 2, 2008, Ilya moved under CR 60 to vacate the decree of separation and dissolution, arguing that he never signed the joinder.[2] Lyubov countered that Ilya signed the joinder and knew about the separation petition before she filed it. The court denied Ilya's motion to vacate.

Ilya moved for reconsideration on February 19, 2008, and again on March 17, 2008, presumably arguing that the joinder was fraudulent.[3] The trial court denied the motions because it found the "11/21/05 joinder valid." CP at 251.

ANALYSIS

I. Right to Oral Testimony

Ilya first contends that the trial court erred in determining the validity of the joinder based

[2] Ilya failed to provide this court with the affidavit that accompanied his motion to vacate.

[3] Ilya provides his motions for reconsideration, but the record does not contain a supporting memorandum of authority.

on conflicting affidavits and declarations alone.[4]

A CR 60 motion generally does not require the court to take live testimony. *Roberson v. Perez*, 123 Wn. App. 320, 331, 96 P.3d 420 (2004) (citations omitted). But live testimony is preferable "where an outcome determinative credibility issue is before the court." *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). Here, whether Ilya signed the joinder is a credibility issue because the parties filed conflicting affidavits and the outcome turns on how the court resolves the credibility issue. Although *Rideout* involved a contempt proceeding, we find relevent its recognition that "issues of credibility are ordinarily better resolved in the 'crucible of the courtroom, where a party or witness' fact contentions are tested by cross-examination, and weighed by a court in light of its observations of demeanor and related factors.'" *Rideout*, 150 Wn.2d at 352 (citations omitted). Thus, absent some procedural hurdle, Ilya would have been entitled to present testimony as to whether he signed the joinder.

II. Waiver of Right to Oral Testimony

Although Ilya had the right to request oral testimony to challenge the validity of the joinder, he did not do so before the court entered the decree. A party waives his or her defense when that party's previous behavior is inconsistent with an assertion of the defense or when counsel has been dilatory in asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000); *see also Romjue v. Fairchild*, 60 Wn. App. 278, 281-82, 803 P.2d 57 (1991)

[4] Whether the joinder is valid is significant because when both parties join in a legal separation action, there is no need for a summons, service of process, or a response because there are no contested issues. *In re Marriage of Wherley*, 34 Wn. App. 344, 347, 661 P.2d 155 (1983). In such a case, the decree is obtained by consent. *See Wherley*, 34 Wn. App. at 348. And the decree of legal separation may be converted by motion to a decree of dissolution no earlier than six months after its entry. RCW 26.09.150.

(holding that defendant waived insufficient process defense when he engaged in discovery and waited until after the statute of limitations had expired to move to dismiss for insufficient process). The doctrine of waiver recognizes that "[i]f litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised." *Lybbert*, 141 Wn.2d at 39.

This case is similar to *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991), where the appellant argued that the trial court erred in deciding whether he was served based on conflicting affidavits alone. *Leen*, 62 Wn. App. at 478-79. The court found that the appellant waived his right to live testimony because he did not request it at the trial court level, and he did not object to the court proceeding based on affidavits. *Leen*, 62 Wn. App. at 478-79. Similarly here, Ilya waived his right to present oral testimony because he knew that the trial court would rely on the joinder and separation decree. And although his attorney appeared after Lyubov filed the motion to convert the separation decree into a dissolution decree, Ilya never asked to present oral testimony on whether the joinder supporting the separation decree was fraudulent. In fact, Ilya raised the live testimony issue for the first time on appeal. Because Ilya is now taking a position inconsistent with his position prior to entry of judgment, and because he was dilatory in requesting oral testimony, he waived his right to present it.

We next consider whether substantial evidence supports the trial court's finding that the joinder was valid based on the affidavits and declarations alone.

III. Validity of the Joinder

Ilya maintains that the joinder on which the decrees rely was fraudulent. He asserts that

the signature "bears little resemblance" to his signature. CP at 197. In contrast, Lyubov

asserts that Ilya's signature was "not forged. He signed the joinder. . . . He approved the initial pleadings." CP at 76. She provided the trial court with copies of Ilya's signatures during the same time period for comparison. Ilya also provided signature samples. After reviewing these declarations, the trial court found the joinder valid.

Generally, we review de novo a trial court decision based on affidavits and other documentary evidence. *Rideout*, 150 Wn.2d at 350 (citations omitted). But *Rideout* determined for the first time the standard of review of an appellate court reviewing documentary evidence when credibility is very much at issue. *Rideout*, 150 Wn.2d at 350. The court found that because the trial court proceeding turned on credibility and a factual finding, the appropriate standard of review is substantial evidence. *Rideout*, 150 Wn.2d at 350-51. We apply that standard of review here because the court made a credibility determination based on affidavits and other documentary evidence alone.

Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). If the standard is satisfied, we will not substitute our judgment for the trial court's. *Pardee*, 163 Wn.2d at 566. Here, substantial evidence supports the trial court's finding that Ilya signed the joinder. We will not substitute our judgment for the trial court's judgment.

Lyubov submitted to the trial court other dissolution pleadings Ilya signed on the same date listed in the joinder, which allowed the court to infer that Ilya also signed the joinder that day. The parties also gave the trial court signature samples so that it could compare Ilya's

known signature with the signature on the joinder. Finally, the trial court read the parties' declarations as to the circumstances of Ilya's signing the joinder. Under these circumstances, the trial court could find Lyubov's declaration and signature samples more persuasive and it could reasonably doubt Ilya's credibility based on the untimely fraud argument and his failure to raise the issue before entry of the dissolution decree. We conclude that substantial evidence supports the trial court's finding that the joinder was valid.

IV. CR 60 Motion

Ilya maintains nonetheless that the trial court should have vacated the final decree based on his claim of fraud under CR 60. We are "extremely reluctant to vacate a decree . . ." in a dissolution matter, *Allen v. Allen*, 12 Wn. App. 795, 798, 532 P.2d 623 (1975), because "[t]he emotional and financial interests affected by [dissolution] decisions are best served by finality. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). CR 60(b)(4) authorizes a trial court to vacate a judgment based on fraud, misrepresentation, or other misconduct of an adverse party. There are two ways to prove fraud or misrepresentation: (1) prove the nine elements of fraud; or (2) show that the nonmoving party breached the affirmative duty to disclose a material fact. *Baddley v. Seek*, 138 Wn. App. 333, 338-39, 156 P.3d 959 (2007) (citing *Baertschi v. Jordan*, 68 Wn.2d 478, 482, 413 P.2d 657 (1966)). The moving party must establish the fraud by clear and convincing evidence. *Baddley*, 138 Wn. App. at 339. Because there was substantial evidence to support the trial court's finding that the joinder was valid, Ilya did not prove fraud by clear and convincing evidence. The trial court properly denied Ilya's motion to vacate the separation and dissolution decrees.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.